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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/635,630	08/06/2003	Melvin R. Kennedy	6865-18	8475
30448	7590	08/03/2006	EXAMINER	
AKERMAN SENTERFITT P.O. BOX 3188 WEST PALM BEACH, FL 33402-3188			DEMILLE, DANTON D	
			ART UNIT	PAPER NUMBER
			3764	

DATE MAILED: 08/03/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/635,630	KENNEDY ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Danton DeMille	3764	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 30 May 2006.  
 2a) This action is FINAL.                    2b) This action is non-final.  
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1-64 is/are pending in the application.  
 4a) Of the above claim(s) 13-17 and 44-47 is/are withdrawn from consideration.  
 5) Claim(s) \_\_\_\_\_ is/are allowed.  
 6) Claim(s) 1-12, 18-43 and 48-64 is/are rejected.  
 7) Claim(s) \_\_\_\_\_ is/are objected to.  
 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.  
 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- 1) Notice of References Cited (PTO-892)  
 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)  
 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
     Paper No(s)/Mail Date 5/10/4, 1/20/4, 12/19/3, 11/24/3
- 4) Interview Summary (PTO-413)  
     Paper No(s)/Mail Date. \_\_\_\_\_.  
 5) Notice of Informal Patent Application (PTO-152)  
 6) Other: \_\_\_\_\_

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## DETAILED ACTION

### *Specification/Drawings*

The disclosure is objected to because of the following informalities:

Regarding the description on pages 12-14, on page 12 lines 10-12 it is recited that figure 3 shows insert 50 with orifice 52 however, it appears figure 3 shows the weight 44 and the orifice associated with it.

In figure 4 and pages 12 and 13, it is also unclear how the insert functions to provide the offset weight displacement as shown. It would appear that if the insert 50 within the opening of the weight 44 is fixed to the drive gear 28, when the drive gear is rotated from the solid line position of 58 to the phantom position 60 the insert would rotate with it and therefore the distance FP of the center of mass would not change. If the insert 50 is fixed to the drive gear 28 then as the drive gear rotates the center of mass would be thrown to the maximum position FP and stay there as the gear continues to rotate. The gear, the weight and the insert would appear to always rotate as a unit. It is not clear how the weight would rotate relative to the insert. This would mean that the weight is somehow driven relative to the insert.

Regarding the description of the embodiment of figs. 14-16, it is unclear how shaft 132 is associated with the water driven impeller since the actual association is not shown.

In the description regarding figure 34, it is stated that the oscillation device 26 of figures 8-13 cause the head to rotate. It is unclear how the oscillation device 26, will cause the rotation of the head. It will cause shaking or vibration of the head as stated in the description of figure 32.

The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. See 37 CFR 1.75(d)(1) and MPEP § 608.01(o). An embodiment in which the at least one gear is positioned in plane that is generally parallel to the longitudinal axis of the massaging device, as recited in claim 4, is not disclosed. Rather, all the embodiments appear to position the gear in a perpendicular/orthogonal plane relative to the longitudinal axis of the massage device.

***Claim Rejections - 35 USC § 112***

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

**Claims 4 and 34 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement.** The claim(s) contains subject matter was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

Regarding claims 4,34, the positioning of the at least one gear in a plane that is generally parallel to the longitudinal axis of the massage device is not disclosed. All embodiments show gears that are orthogonal to the said axis.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

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**Claims 4, 34, 37, 39, 59 and 64 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.**

It is not clear how the at least one gear in a plane generally parallel to the longitudinal axis of the massage device works with the rest of device since the disclosure of such an arrangement is not clearly set forth in the specification as noted above.

Claim 37 recites the limitation "the at least one weight" in line 2. There is insufficient antecedent basis for this limitation in the claim. At least one weight was not mentioned in parent claims 31,32, Rather, it appears that this claim should depend on either claim 35 or 36.

Regarding claim 39, it is not clear how the center of mass of the first gear is movable relative to itself.

It is not clear how claim 59 further limits claim 31 because claim 31 already recites the head is pivotally coupled to the handle.

It is also not clear how claim 64 further limits claim 62 because claim 64 further limits the fluid exhausted from the device however, the fluid is not part of the claimed combination and there is no structure recited to provide the function.

#### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re*

*Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

**Claims 1-12, 18-43 and 48-64 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-42 of copending Application No. 10/804973 in view of Behm.** It would have been obvious to one of ordinary skill in the art to modify the pending claims to include a pivoting handle as taught by Behm to better manipulate the head of the device.

This is a provisional obviousness-type double patenting rejection.

#### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

**Claims 1, 18, 19, 22, 23, 26-29, 31, 48, 49, 54-57, 59-64 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gyldenfeldt (DE 19856910 A1) in view of Behm.**

Gyldenfeldt teaches a massaging device that includes a head shown in figures 1 and 2 and includes a chamber containing at least one impeller 4. The fluid conduit 2 has an outlet positioned proximate to the impeller 4. The oscillation device 6 is substantially shielded from contact by the fluid by being within it's own container 7. Gyldenfeldt may not teach a handle

pivots attached to the head however, Behm teaches a handle 18 that is pivotally attached at 16-22 to the head. It would have been obvious to one of ordinary skill in the art to modify Gyldenfeldt to include a pivoting handle as taught by Behm to better manipulate the head.

**Claims 24, 25, 52, 53 are rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 1 above, and further in view of Scott.**

Scott teaches adding a container including a valve 30 for providing an additive to the water as desired. It would have been obvious to one of ordinary skill in the art to further modify Gyldenfeldt to include an additive emitting chamber and valve as taught by Scott to provide the added benefit of adding soap or oil to the water for treating the skin.

**Claims 2-12, 20, 21, 30, 32-43, 50, 51, 58 objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.**

***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

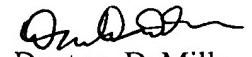
1. US 6,730,051. Lin. Rotating and Vibrating Massage Shower Nozzle.
2. US 4,846,158. Teranishi. Hand Type Electric Massage Machine.
3. US 835,290. Richwood. Fluid Actuated Vibrator

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Danton DeMille whose telephone number is (571) 272-4974. The examiner can normally be reached on M-F from 8:30 to 6:00 EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Greg Huson, can be reached on (571) 272-4887. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

1 August 2006



Danton DeMille  
Primary Examiner  
Art Unit 3764